Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER 1975 TERM

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

SANDRA WETZEL, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF AMICI CURIAE
of
OWENS-ILLINOIS, INC. and
THE SHERWIN-WILLIAMS COMPANY

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By consent of the petitioner and the respondent as evidenced by the letters of consent appended hereto, Owens-Illinois, Inc. and The Sherwin-Williams Company file this joint brief as *amici curiae*.

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INTEREST OF THE AMICI CURIAE

OWENS-ILLINOIS, INC. ("Owens-Illinois") and The Sherwin-Williams Company ("Sherwin-Williams"), major national manufacturers of container and paint products, respectively, employ throughout the United States a substantial number of female employees. Of these female employees, many fall within the "affected group" alleged to be discriminated against because of sex as a result of the failure of *Amici Curiae* to comply with maternity benefit standards promulgated by the Equal Employment Opportunity Com-

mission ("EEOC") in Section 1604.10 of its April 5, 1972, "Sex Discrimination Guidelines," 29 C.F.R. 1604.10,[1] which reversed the agency's prior interpretation of Title VII of the Civil Rights Act of 1964, as amended ("the Act"), 42 U.S.C. Sec. 2000e-2.

While their respective plans take varying forms,[2] Owens-Illinois and Sherwin-Williams – like most employers throughout the Nation – do not provide medical and disability benefits for normal pregnancy and childbirth "on the same terms and conditions as they are applied to other temporary disabilities," Guidelines, Section 1604.10(b), *viz.*, on the same bases as medical and disability benefits provided male and female employees who sustain non-occupational illnesses or injuries. As a result, Owens-

[1] Section 1604.10 (hereinafter referred to as "Guidelines") provides, *inter alia*:

> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority, and other benefits and privileges, reinstatement, and payments under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

[2] Amici Curiae plans include those unilaterally adopted and those negotiated in good faith with collective bargaining representatives of appropriate units of their employees pursuant to obligations arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. Secs. 158(a)(5) and 158(d). The obligation to bargain collectively in good faith cannot be easily avoided by invocation of Title VII or Executive Order 11246, *see Williams Enterprises, Inc.*, 212 NLRB No. 132 (1974). *Cf. W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949) (employee benefit plans are mandatory subject of collective bargaining). Negotiated plans also raise the question of joint labor-management backpay liability exposure. *Cf. Albermarle Paper Co. v. Moody*, 43 U.S.L.W. 4880 (U.S., June 25, 1975) (No. 74-389); *Herrera v. Yellow Freight Systems, Inc.*, 505 F.2d 66 (5th Cir. 1974); *Buxwell v. Eastern Air Lines, Inc.*, 9 EPD Para. 10,234 (E. D. Va. 1975).

Illinois is a respondent to an administrative proceeding in which the EEOC has made a "Determination" that there exists "reasonable cause to believe that respondent's maternity leave policy and benefits are not in compliance with the Commission's Guidelines on Discrimination Because of Sex, and are in violation of Title VII." EEOC Charge No. TSL4-2387 (May 17, 1975). Similarly, Sherwin-Williams is a defendant in both a public and a private action alleging violation of Title VII as a result of a maternity benefits policy which does not comply with the same EEOC Sex Discrimination Guidelines. *EEOC v. Sherwin-Williams Company*, N.D. Ohio, C.A. No. C75-423, filed May 14, 1975; and *Stansell, et al. v. Sherwin-Williams Company*, N.D. Ga., C.A. No. C75-379A, filed February 28, 1975.

Owens-Illinois and Sherwin-Williams have more than an academic interest in the outcome of this *Liberty Mutual* litigation: if the decision of the United States Court of Appeals for the Third Circuit is allowed to stand, its principles will in all likelihood control the above-cited administrative and judicial proceedings and will require either an extremely costly expansion of non-occupational disability benefit coverage to include pregnancy and childbirth[3] or it will require a substantial reduction in benefit amounts to be paid in the future for non-occupational disabilities arising out of illness or injury in order to provide the same cover-

[3] In Appendix A to its Amicus Curiae Brief in support of the grant of the petition for writ of certiorari in the instant case, the U.S. Chamber of Commerce quoted the typical disability plan percentage cost increase which the insurance industry estimated if the Guidelines, Section 1604.10(b) are judicially approved: "the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan."

According to Actuary Paul Jackson, who testified in *Gilbert v. General Electric Co.*, "the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000." Brief for General Electric Company, filed in the U.S. Court of Appeals for the Fourth Circuit in *Gilbert v. General Electric Co.*, p. 8.

age for maternity and yet maintain the same disability benefit plan costs.[4]

SUMMARY OF ARGUMENT

The issue of vital interest to Owens-Illinois and Sherwin-Williams is whether they may continue to exclude maternity and related conditions from the coverage of their non-occupational disability benefit programs without violating the "sex" discrimination prohibitions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, *et seq*. Collaterally, *Amici Curiae* urge this Court to refuse to defer to Section 1604.10(b) of the EEOC's "Sex Discrimination Guidelines" issued April 5, 1972.

The *Amici Curiae* submit that differentiation "for [a] reason other than discrimination on account of . . . sex," Section 706(g) of the Act, 42 U.S.C. Sec. 2000e-5(g), in the provision of benefits between "pregnant women and non-pregnant persons" who are disabled as the result of non-occupational illnesses or injuries is not "sex" discrimination within the meaning of Section 703 of the Act, 42 U.S.C. Sec. 2000e-2, and believe that this Court has so suggested in its prior decisions in *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

Furthermore, *Amici Curiae* contend that EEOC Guidelines, Section 1604.10(b), is not entitled to deferral because: (1) that section was adopted arbitrarily and capriciously without compliance with procedural safeguards and without consideration of either its medical or fiscal implications; (2) that section was not adopted con-

[4] A corresponding 40-50 percent reduction in benefits available to male and female employees who suffer non-occupational disabilities caused by illness or injury could be necessary in order to avoid the tremendous cost increase Section 1604.10(b) otherwise would require.

temporaneously with the Act and is not consistent with prior EEOC interpretations of the Act indicating that exclusion of maternity from disability coverage did not violate the Act; and (3) neither the Act, nor its 1964 or 1972 legislative history support deferral to such an interpretation of the Act.

Finally, *Amici Curiae* strongly believe that matters such as herein involved, which effect major alterations in social philosophy and insurance industry practices, as well as the cost thereof, dictate that the obligations such as provided in Section 1604.10(b) should be imposed, if at all (and they should not be), only by Congress after careful deliberation through the legislative hearing and debate process, rather than by administrative agency fiat or judicial decision.

All of the foregoing arguments support reversal by this Court of the decision of the United States Court of Appeals for the Third Circuit, accompanied by a declaration by this Court that differentiation in the provision of disability benefits on the basis of pregnancy, not sex, does not violate Title VII and Federal court deferral to EEOC Guidelines, Section 1604.10(b), is unwarranted.

ARGUMENT

I.

The Failure to Provide the Same Disability Benefits to "Pregnant Women and Nonpregnant Persons" Is Not Discrimination Because of Sex Prohibited by Title VII.

Congress provided in the Act that "[n]o order of the court shall require . . . the payment . . . of any back pay . . . if [the personnel action complained of was taken] for any reason other than discrimination on account of . . . sex . . .", Section 706(g) of the Act, 42 U.S.C. Sec. 2000e-5(g). As

the United States Court of Appeals for the Fifth Circuit so carefully reasoned:

> Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. . . . Though the general policy of the Act doubtless was to halt arbitrary employment practices, through the unmistakable words of the Act's actual text Congress has offered its conception of the *specific spheres* in which this general policy is to operate, and thereby has necessarily limited the policy's outreach. *See Moragne v. United States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). (Emphasis added.)

Espinoza v. Farah Mfg. Co., Inc., 462 F.2d 1331, 1334 (1972), aff'd 414 U.S. 811 (1973). Section 703 of the Act, 42 U.S.C. Sec 2000e-2, established but five "specific spheres" or bases of prohibited employment practices: race, color, religion, sex, or national origin. It is for Congress, not the EEOC, to expand *legislatively* these statutory "spheres." U.S. Constitution, Article I, Section 1 and Section 8, Clause 18.

In a recent decision, this Court defined "sex discrimination" as it perceived Congress' intent in enacting Section 703 of the Act, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); and it suggested that the exclusion of pregnancy from disability benefit coverage was not "sex discrimination" in *Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Phillips*, this Court held:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school age children.

400 U.S. at 544. Subsequently, in *Aiello*, a majority of this Court expressly rejected the theory (which is the major premise of the Third Circuit's decision now before this Court for review, as well as the similar decisions rendered by the Courts of Appeal for the Second and Fourth Circuits)[5] that "dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex inevitably constitutes sex discrimination," 417 U.S. at 501 (dissent). In so doing, the majority suggested what should also become the correct application of the Act to the maternity benefit issue now before the Court:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71, and *Frontiero v. Richardson*, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the

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[5] *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3d Cir. 1975); *Communications Workers of America v. American Telephone and Telegraph Co.*, ___ F.2d ___, 9 EPD Para. 10,035 (2d Cir. 1975); *Gilbert v. General Electric Co.*, ___ F.2d ___, 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557). *Contra: Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973). Although the *Wetzel* decision was particularly critical of the "voluntariness" argument, *viz.*, that with today's contraceptive methods pregnancy can largely be avoided, Owens-Illinois and Sherwin-Williams find it socially and morally questionable to require employers to underwrite the cost of family planning, rather than the individual whose pregnancy — substantially if not wholly through her own action — prevents her from being able to work, the normal *quid pro quo* for receiving compensation.

members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. at 496-97, n. 20.

As Judge Haynsworth recognized[6] in *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 397-398 (4th Cir. 1973), rev'd 414 U.S. 632 (1974):

> Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification of sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males

[6] While such reasoning may not pass constitutional muster to justify mandatory commencement of maternity leave at an arbitrary date when the pregnant female is nevertheless as physically capable as her male counterpart to perform her job, it certainly should support a constitutionally and statutorily defensible differentiation in benefits afforded a female on maternity leave as opposed to men and women alike disabled by non-occupational illness or injury. *Compare Cohen v. Chesterfield County School Board* and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (companion cases), *with Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), Judge Henderson condemned as sexually discriminatory under the Act the mandatory maternity leave commencement policy, but recognized that fringe benefit differentiation, notwithstanding the EEOC's Guidelines to the contrary, did not violate the Act.

> from those experiences, and no such laws or regulations relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood . . . Pregnancy and maternity are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex.

Owens-Illinois and Sherwin-Williams, like the State of California and most employers in the Nation, maintain separate benefit programs for two distinct groups of employees, classified in the words of this Court in *Aiello*: "pregnant women and nonpregnant persons." 417 U.S. at 497, n. 20. The former is a unique classification of physiologically *normal*[7] pregnant women who are unable to work for an individually determinable[8] pre- and postpartem period; the latter is the only classification in which benefits can and do accrue to male and female employees alike for non-occupational disability resulting from physiologically *abnormal* conditions: illness or injury.

It is simply not "sex discrimination," within the meaning of Section 703 of the Act, to differentiate "for any reason other than discrimination on account of . . . sex," Section 706(g), 42 U.S.C. Sec. 2000e-5(g), *i.e.*, pregnancy, not sex, in the provision of benefits between the foregoing groups. As two Federal circuit courts have eliminated the "haircut cases" from the scope of the sex discrimination

[7] *See Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973). *See* footnote 14 and accompanying text, *infra*, reflecting that the author of Section 1604.10(b) had no EEOC study or other medical facts on which she based the guideline.

[8] According to the expert medical testimony of Dr. Vincent Tricome, Chief of Gynecology for one of New York City's largest hospitals, before the New York State Human Rights Division in *Grimmer v. Eastern Air Lines, Inc.*, Case No. CSF-29861-73, on January 30, 1974, a "normal" pregnancy might be expected to require for most job classifications maternity leave commencing from two to three weeks before and lasting no more than six weeks after delivery. *Compare Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238, 240 (N.D. Ga. 1973) (physician approved return to work six weeks after delivery).

prohibitions of the Act,[9] this Court should remove the maternity benefit issue from the ambit of the Act by refusing to defer to Guidelines, Section 1604.10(b).

II.

Guideline Section 1604.10(b) Is Not Entitled to Judicial Deference.

In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 n. 8 (1974), this Court recognized that Section 1604.10 and related Guidelines "will affect like suits in the future" and "express[ed] no opinion as to the validity of any of these regulations." The validity of Section 1604.10 is now at issue.

A. Guideline, Section 1604.10(b), was arbitrarily and capriciously adopted without proper procedural safeguards and without consideration of either its medical or fiscal implications.

Owens-Illinois and Sherwin-Williams entertain serious reservations whether the EEOC has been authorized by Congress to issue *any* "Guidelines" such as those promulgated April 5, 1972, out of which the instant litigation arises. Section 713(a) of the Act, 42 U.S.C. Sec. 2000e-12(a), authorizes the EEOC "to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this title" (emphasis added). EEOC was granted only *procedural, not substantive,* rulemaking authority, a clear indication of Congress' intent to allow EEOC substantially less rulemaking authority than most other administrative

[9] *See Willingham v. Macon Telegraph Publishing Co.*, ___ F.2d ___, 9 EPD Para. 9957 (5th Cir. 1975) (*en banc*); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Dodge v. Giant Foods, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973).

agencies, such as the National Labor Relations Board ("NLRB").[10]

And even if EEOC had rulemaking authority comparable to the NLRB, it should be compelled, when engaging in substantive rulemaking, to follow the procedural safeguards provided by the Administrative Procedure Act ("APA"), 5 U.S.C. Sec. 553.[11]

Yet EEOC claimed in its prefatory statement accompanying its April 5, 1972, "Sex Discrimination Guidelines" which, it should be noted, were published in the *Federal Register* section entitled "Rules and Regulations":

> Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in the effective date are inapplicable.

37 F.R. 6835, 6836 (April 5, 1972), citing as "authority" for publication Section 713(b) of the Act, 42 U.S.C. Sec. 2000e-12(b).

[10] *Compare* 29 U.S.C. Sec. 156, NLRB rulemaking authority is not limited by a "procedural" qualifier such as is contained in Section 713(a) of the Act, 42 U.S.C. Sec. 2000e-12(a).

[11] This Court last year summarized the APA safeguards:

> [P]ublication in the *Federal Register* of notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate; a statement of the basis and purpose of the proposed rule; and publication in the *Federal Register* of the rule as adopted.

NLRB v. Bell Aerospace Co., 416 U.S. 267, 291 n. 21 (1974).

Compare 40 F.R. 13311 wherein the United States Department of Labor proposed certain additions to its Revised Order No. 14, 41 C.F.R. 60-60 with respect to how the Office of Federal Contract Compliance proposes to proceed to ascertain what constitutes an "affected class" and how to compute "backpay relief" in its administration and enforcement of Executive Orders 11246 and 11375. *Query* why EEOC views its rulemaking authority to be unrestrained by the procedural safeguards imposed upon other agencies by the APA? Section 713(b) of the Act, 42 U.S.C. Sec. 2000e-12(b), certainly provides no such license.

In fact, pretrial discovery in *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), revealed that "the 1972 [sex discrimination] guidelines were composed by one person (Mrs. Fuentes)[12] who had no expertise in the field of medicine, economics, or labor relations, and who was assisted in her work by only four other people, including two law students employed as law clerks.[13]

Mrs. Fuentes further testified that EEOC conducted no medical or financial studies on the basis of which it predicated the maternity benefit guidelines contained in Section 1604.10(b).[14] No public notice or public participation occurred even though EEOC intended to reverse, with the adoption of Section 1604.10(b), the prior written interpretations of its General Counsel, the Commission's concurrence therein reflected in its own report to Congress,[15] and the silence with respect to maternity benefits of the Guidelines prior to April 5, 1972.[16]

Judge Henderson quite correctly observed in refusing to defer to Guidelines, Section 1604.10(b), that "there appears to be no factual basis upon which these regulations were drawn." *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238, 245 (N.D. Ga. 1973).

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[12] Mrs. Sonia P. Fuentes, then Chief of the Legislative Counsel Division of the EEOC, who testified on deposition taken May 31, 1973, that she was responsible for drafting the Sex Discrimination Guidelines. Amicus Curiae Brief filed by Delta Air Lines, Inc. in *Cohen v. Chesterfield County Board of Education* and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), pp. 25-26.

[13] *Id.* at 25.

[14] *Id.* at 25 and Appendix F thereto, pp. A-46 and 47.

[15] *See* footnote 19 and accompanying text, *infra*.

[16] The EEOC originally issued its "Sex Discrimination Guidelines" on November 22, 1965, (30 F.R. 14926) reaffirmed them on February 21, 1968 (33 F.R. 3344), amended them on August 19, 1969 (34 F.R. 13367) and last amended and reissued them March 30, 1972, effective April 5, 1972 (37 F.R. 6835). 1 CCH Emp. Prac. Guide Para. 3950.

Unrestricted administrative agency "legislation," such as occurred with the EEOC's April 5, 1972, promulgation of its new "Sex Guidelines," without compliance with APA rulemaking safeguards is far more disconcerting to the Nation's employers than the "adjudicatory" vs. "rulemaking" controversy which has long raged with respect to what type of "hearing" the NLRB should employ to change its substantive interpretations of the law. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The lack of statutory authority for EEOC to promulgate *substantive* regulations and the agency's failure to comply with the procedural safeguards of the APA in issuing the April 5, 1972, "Sex Discrimination Guidelines" warrant this Court refusing to defer to Guidelines, Section 1604.10(b).

B. Guidelines, Section 1604.10(b) was not adopted contemporaneously with enactment of the Act's sex discrimination prohibitions and is not consistent with prior agency interpretations of the Act with respect thereto.

This Court has held that a *contemporaneous* and *consistent* construction of a statute by the administrative agency charged with its enforcement is entitled to great deference by the Federal courts. *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973). But, "[w]hile acknowledging deference is due, blind adherence is not." *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331, 1334 (5th Cir. 1972), aff'd 414 U.S. 811 (1973).[17]

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[17] Each of the circuit court decisions rendered to date, Owens-Illinois and Sherwin-Williams submit, failed to follow this admonition. In addition to the Third Circuit's decision presently before this Court (511 F.2d 199 (1975)), two other circuit courts have followed the reasoning of the maternity benefit Guidelines. *Communications Workers of America v. American Telephone and Telegraph Co.*, ___ F.2d ___, 9 EPD Para. 10,035 (2d Cir. 1975), rev'g and rem'g 379 F.Supp. 679 (S.D. N.Y. 1974); *Gilbert v. General Electric Co.*, ___ F.2d ___, 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557).

Guidelines, Section 1604.10 was not adopted contemporaneously with the Act and is not consistent with prior agency interpretations of the Act.

The Act's Section 703 sex discrimination prohibitions, 42 U.S.C. Sec. 2000e-2, became law on July 2, 1964, and were effective one year later on July 2, 1965. Section 716(a) of the Act, 42 U.S.C. Sec. 2000e-15(a). Section 1604.10 of the Guidelines was published in the *Federal Register* and became effective on April 5, 1972, almost eight years after enactment and seven years after the effective date of the anti-discrimination provisions of the Act.

The earlier "Sex Discrimination Guidelines" expressed no view as to how disabilities caused by pregnancy and childbirth would be treated by EEOC.[18] Between 1966 and 1971, every public pronouncement by EEOC rejected the interpretation of the Act now set forth in Guidelines, Section 1604.10(b).

In a letter released November 10, 1966, EEOC General Counsel Charles Duncan declared: "[A]n insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory." Between December 21, 1966, and May, 1971, CCH Employment Practices Guide continued to report the contents of an opinion letter issued by Mr. Duncan on October 17, 1966, and released by EEOC on December 9, 1966, which read:

> You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.

[18] *See* footnote 16, *supra*.

> In a recent opinion letter regarding pregnancy, we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.

In another letter dated November 15, 1966, Mr. Duncan wrote: "we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness."

The foregoing EEOC policy was also reflected in the agency's First Annual Report[19] which stated at page 40:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. . . .

Mr. Duncan, in testimony at trial in *Gilbert v. General Electric Co.*, 375 F.Supp. 367 (E.D. Va. 1974), aff'd 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557), reaffirmed in detail the EEOC's reasoning underlying the foregoing interpretation of the Act.[20]

[19] This report covered the fiscal year ending June 30, 1966, and was sent to Congress on March 1, 1967. 42 U.S.C. Sec. 2000e-4(e).

[20] Brief for General Electric Company to the United States Court of Appeals for the Fourth Circuit in *Gilbert v. General Electric Co.*, No. 74-1557, pp. 24-25.

Until April 5, 1972, the official "interpretations" of the Act as reflected in EEOC General Counsel's opinion letters and in the silence of the Guidelines prior thereto *consistently sanctioned*, rather than condemned, differentiation in the provision of benefits for maternity and non-occupational illness and injury disabilities.[21]

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), this Court observed:

> The weight of such a judgment [i.e., an administrative agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

Where agency interpretations are neither contemporaneously adopted with the enactment of a law, nor consistent with prior interpretations, they are not entitled to judicial deferral. The non-deferral principle was succinctly articulated in *FTC v. Jantzen, Inc.*, 356 F.2d 253, 254 n. 4 (9th Cir. 1966), rev'd on other grounds, 386 U.S. 228 (1967):

> . . . [W]e owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect.

[21] On March 19, 1971, EEOC Decision No. 71-1474, CCH Decisions Para. 6221, was released, reflecting that there existed "reasonable cause to believe" that denial of salary continuation benefits where such benefits were granted for *all* other non-occupational disabilities, without reference to prior inconsistent interpretation of the Act in the opinions of General Counsel and the EEOC's reports to Congress. This decision was in conflict with a prior one released on December 16, 1969, EEOC Decision No. 70-360, CCH EEOC Decisions Para. 6084, which cited with approval the General Counsel's November 15, 1966, opinion letter hereinbefore quoted. Owens-Illinois and Sherwin-Williams submit that this one 1971 EEOC decision could not be interpreted as repudiating five years' of official interpretation of the Act otherwise. *Cf. Smith v. Universal Services, Inc.*, 4 EPD Para. 7617 (5th Cir. 1972).

> But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute. . . .

Section 1604.10 of the "Sex Discrimination Guidelines" simply does not meet this Court's "consistent and contemporaneous construction" standard, *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973) and, therefore, warrants no deferral.

C. Neither the Act nor its 1964 and 1972 Legislative History support deferral to Guidelines, Section 1604.10(b).

Where an Act and its legislative history support an EEOC interpretation, good reason may exist for treating a corresponding agency "guideline" as expressing the will of Congress. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971). On the other hand, this Court has more recently refused to defer to an EEOC Guideline where there existed "compelling indications that it is wrong." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973), citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

When the bill that ultimately became the Act was reported out of the Rules Committee of the House of Representatives on January 30, 1964 – one day before its passage – "sex" discrimination was nowhere therein proscribed; rather, the word "sex" was inserted by Congressman Smith as a last minute amendment during floor debate. 110 Cong. Rec. 2577 (1964). *See Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971), cert. denied 404 U.S. 950 (1971).[22]

[22] Because every male Congressman who supported the "sex" amendment voted against passage of the Act, 110 Cong. Rec. 2577-84, 2804 (1964), it has been surmised that the actual purpose of the amendment was to help defeat the Act's passage. *See, e.g., Rosen v. Public Service Electric & Gas Co.,*

Congressman Cellar, floor manager for the administration, argued against the Smith amendment and urged Congress to "wait until mature studies have been made before passing anti-discrimination laws applying to sex." 110 Cong. Rec. 2578 (1964). The *only* expression of Congressional purpose underlying the "sex" amendment appears to be that it was designed to prohibit denial of employment itself in certain occupations to one sex or the other solely because of sex. 110 Cong. Rec. 2577-2584 (1964). Congresswoman Green warned prophetically: "[F]ull and careful consideration was not given to the amendment . . . , there were no hearings by any Committee of the House; not a single word of testimony was taken; and the full implications could not have been understood." 110 Cong. Rec. 2720 (1964).

Similarly, there is nothing in the legislative history of the 1972 amendments to the Act, which involved changes, largely procedural rather than substantive in nature,[23] to support EEOC's switch in interpretation with respect to maternity benefit obligations, while there are several indications in that legislative history which support the view that Congress was neither asked to review the concept of whether maternity benefits should be brought within the ambit of the Act's *substantive* "sex" discrimination prohibitions, nor was Congress aware that EEOC intended to change its Guidelines or interpretations with respect thereto.

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328 F.Supp. 454, 463 n. 4 (D.N.J. 1971). Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

[23] The principal concern of Congress was whether EEOC should be granted NLRB-style "cease-and-desist" authority with judicial review confined to the "substantial evidence" standard established in this Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), or whether it should be authorized enforcement powers only through direct access to the Federal trial courts. *See* 2 U.S. Code Cong. & Admin. News 2137 (1972); and Hearings before Senate and House Subcommittees, *infra.*, footnote 24. *See generally*, Pope & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824 (1972).

EEOC Chairman William H. Brown, III, testified *without mentioning* the subject of maternity benefits or indicating that any changes were forthcoming to the agency's 1969 Sex Discrimination Guidelines then in force, in each of the hearings before the House and Senate Labor subcommittees considering amendment of the Act.[24] A review of the entire legislative history of the 1972 amendments to the Act reflects, with respect to remarks concerning "sex" discrimination only:

(1) A solitary reference to denial of maternity benefits to teachers[25]; and

(2) Several references to unequal employment *opportunities* for women, *viz.*, "[s]urveys indicate that women are deliberately placed in less challenging, less responsible, and less remunerative positions on the basis of sex alone."[26]

From the foregoing review of legislative history, Congress can only be assumed to have believed that the Sex Discrimination Guidelines, as amended August 19, 1969, 34 F.R.

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[24] *See* Hearings on S.2453 before Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 38 (1969); Hearings on H.R. 6228 and 13517 before the House General Subcommittee on Labor of the Committee on Education and Labor, 91st Cong., 1st and 2d Sess. 32 (1969-1970); Hearings on H.R. 1746 before the House General Subcommittee on Labor of the Committee on Education and Labor, 92d Cong., 1st Sess. 79 (1971); Hearings on S.2515, S.2617 and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 48 (1971).

[25] May 7, 1971, letter authored by Ms. Mary Jean Collins-Robson, President, Chicago Chapter of the National Organization for Women, Hearings on S.2515, S.2617, and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 434 (1971).

[26] Statement of Mrs. Lucille H. Shriver, Director, National Federation of Business and Professional Women's Clubs, Inc., on October 6, 1971, during Hearings on S.2515, S.2617, and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 272 (1971); H. Rpt. No. 92-238 on H.R. 1746, 92d Cong., 1st Sess. 3-5 (1971); *see also* 117 Cong. Rec. 31960, 31975 (1971); 118 Cong. Rec. 295, 1383, 3383 (1972).

13367, remained the official EEOC interpretation because those Sex Discrimination Guidelines were the ones inserted, together with EEOC's "Guidelines" on each prohibited type of discrimination, into the record during floor debate on a proposed amendment to define substantively the term "religion" as it is used in the Act. 118 Cong. Rec. 705, 723 (1972). The combination of this insertion into the record of the 1969 "Guidelines" in their entirety and EEOC Chairman Brown's silence on any intent to amend or issue additional "Guidelines" can only be construed to mean that Congress was as wholly unaware as the Nation's employers that the EEOC was about to promulgate new "maternity benefit" Guidelines contained in 29 C.F.R. 1604.10(b).

In fact, the April 5, 1972, "Sex Discrimination Guidelines," including Section 1604.10, were not released until six days *after* enactment of the 1972 amendments and were not published in the *Federal Register* and made effective until 12 days after enactment.

On the other hand, the legislative history of the 1972 amendments to the Act illustrates two instances where Congress did expressly consider particular EEOC "Guidelines" and indicated Congressional support for the EEOC's interpretation of the Act in each of those instances:

(1) A floor amendment was offered to H.R. 1746 – though not enacted – which "alters the language of Title VII [Section 703(h) of the Act, 42 U.S.C. Sec. 2000e-2(h)] to better reflect the congressional intent [with respect to "job relatedness" of employment testing] as interpreted by the Court in the Griggs case," 117 Cong. Rec. 31961 (1971); and

(2) A floor amendment was offered – and ultimately enacted as Section 701(j) of the Act, 42 U.S.C. Sec. 2000e-(j) – to define the term "religion" as used in the Act. 118 Cong. Rec. 705, *et seq*.

Floor debate shows that, in adopting Senator Randolph's "religion" amendment, Congress *expressly* endorsed the EEOC's "Religious Discrimination Guidelines" and *expressly* rejected the circuit court decision in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Supreme Court 402 U.S. 689 (1971).

Owens-Illinois and Sherwin-Williams submit that, in the absence of legislative history such as that expressly endorsing EEOC Guidelines on "testing" and "religion," there simply exists no basis upon which to conclude that Congress has ever intended to expand the ambit of the word "sex" in the original 1964 Act to require employer provision of the same disability benefits for pregnant women as are provided for nonpregnant persons who sustain nonoccupational illnesses or injuries.

Since the EEOC had adopted contemporaneously with enactment of the 1964 Act and had consistently thereafter followed an interpretation of the Act contrary to what the agency intended to promulgate after congressional enactment of the 1972 amendments, and since EEOC knew that its 1969 "Sex Discrimination Guidelines" which were silent as to maternity benefits were considered by Congress, EEOC – and those who wish to rely thereon – simply cannot claim Congressional approval of the new maternity benefit guidelines contained in Section 1604.10(b). Had EEOC and the proponents of reversal of the agency's "contemporaneous and consistent" interpretation that exclusion of pregnancy from disability benefits was not "sex" discrimination really wanted Congressional approval of Section 1604.10(b), those new "Guidelines" should have been submitted to Congress in a form permitting statutory redefinition of the term "sex" such as occurred with enactment of Section 701(j), 42 U.S.C. Sec. 2000e-(j), defining "religion" under the Act. U. S. Constitution, Article I, Section 1 and Section 8, Clause 18.

After consideration of EEOC's "contemporaneous and consistent" interpretation of the Act as sanctioning exclusion of pregnancy from non-occupational disability plan coverage and upon realizing that Congress – like the Nation's employers – was kept in the dark until after enactment of the 1972 amendments that EEOC intended to issue Guidelines, Section 1604.10(b), reversing its 1966-1971 interpretation of the Act, Owens-Illinois and Sherwin-Williams believe that there exist "compelling indications that it is wrong" to defer to Guidelines, Section 1604.10(b). *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); and *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973).

In *Willingham v. Macon Telegraph Publishing Co.*, ___ F. 2d ___, 9 EPD Para. 9957 at 7014 (1975) (*en banc*), the Fifth Circuit Court of Appeals rejected the theory that male hair style preferences were protected by the Act's "sex" discrimination prohibition on the same rationale Owens-Illinois and Sherwin-Williams believe this Court should apply to the maternity benefits issue and Section 1604.10(b):

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.
>
> We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly lies.

Mr. Justice Harlan's dissent in *Arizona v. California*, 373 U.S. 546, 626 (1963), has particular application to EEOC's Guidelines, Section 1604.10(b):

> The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. . . . First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Congress, not the EEOC, should "legislate" so radical a revision of social policy and insurance industry practice as Guidelines, Section 1604.10(b) would require.[27]

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[27] Professor Kenneth Culp Davis has noted in discussing Congressional "delegation of power":

> The legislative process is especially qualified and the administrative process is especially unfit for the determination of major policies that depend more upon emotional bent and political instincts than upon investigation, hearing, and analysis.

Administrative Law-Casebook 42 (1965 ed.). Of course, in promulgating Guidelines, Section 1604.10, EEOC made no investigation, held no hearing, and attempted no analysis of the implications of its maternity benefit guidelines, reenforcing the agency's particular unfitness to determine the major social policy changes it did on April 5, 1972.

CONCLUSION

For the foregoing reasons, Amici Curiae urge that this Court reverse the decision of the United States Court of Appeals for the Third Circuit, declaring that differentiation in the provision of benefits between "pregnant women and nonpregnant persons" does not violate the Act and refusing to defer to Guidelines, Section 1604.10(b), to the contrary.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that, in accordance with Rule 33(1) of this Court's Rules, I have served three copies of this Amici Curiae Brief of Owens-Illinois, Inc. and The Sherwin-Williams Company on each party separately represented in this matter by depositing the same in a United States post office, first-class air mail, postage prepaid, addressed to the below-listed counsel of record:

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This 28th day of July, 1975.

/s/ LLOYD SUTTER

LLOYD SUTTER